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NOT TO BE PUBLISHED

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. FRANKLIN JASPER WILSON, Defendant and Appellant.	E027271 (Super.Ct.No. FVA 09263) OPINION

APPEAL from the Superior Court of San Bernardino County. Walter L. Blackwell, Judge. Affirmed in part; reversed in part with directions.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Gary W. Schons, Senior Assistant Attorney General, Carl H. Horst and Peter Quon, Jr., Supervising Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction

In two separate cases,[1] defendant has been sentenced to a total prison term of 53 years four months, to life. Defendant's aggregate sentence in the present case is for 27 years to life. The present case involves a home invasion robbery, and related crimes against two victims, which netted defendant $60. Defendant challenges his convictions on count 1 for kidnapping for purposes of robbery, on count 5 for first degree residential robbery, and on count 9 for carjacking.[2]

We reverse the conviction on count 5 and remand for resentencing on count 9. Otherwise, we affirm.

2. Testimony at Trial

Ja'von Satchell, a young married woman, testified that, after midnight on February 28, 1998, an armed man broke into her apartment by kicking in the locked front door. The armed man let defendant in through the patio door. Defendant took the gun, shrouded Mrs. Satchell's head with a cover, and demanded money. The men ransacked the apartment. Mrs. Satchell helped them in order to convince them there was no hidden money. At defendant's insistence, she then called her husband, Cedric Satchell, and, as a ruse, asked him to come home because she was sick.

Mr. Satchell arrived home and felt a gun to the back of his head as he approached the

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[1] FSB 18924 and FVA 9263.

[2] Penal Code sections 209, subdivision (b)(1), 212.5, subdivision (a) and 215, subdivision (a).

front door. Defendant searched Mr. Satchell and took his car keys, wallet, pocket knife, and pen. Mr. Satchell knew defendant from having dated his sister four years earlier. Once or twice when he was younger, Mr. Satchell had loaned his car to defendant or his sister.

On this evening, defendant threatened Mr. Satchell and demanded money. With defendant driving Mr. Satchell's black truck, they left the apartment to go to Mr. Satchell's mother's house while the other man guarded Mrs. Satchell. En route, they passed some police officers and defendant threatened to shoot Mr. Satchell if he said anything to them. Mr. Satchell woke his mother and obtained $40, which he gave to defendant. Mr. Satchell withdrew another $20 from an automatic teller machine for defendant.

After defendant and Mr. Satchell returned to the apartment, defendant and the other man left, taking the truck. The Satchells then discovered their phone line had been cut. The Satchells found several jackets missing from their belongings. The truck was returned a week later in a dirty and damaged condition.

Defendant's former fiancée testified that she spent February 28 and 29, from 9:00 or 10:00 p.m. until 5:30 or 6:00 in the morning, with defendant and he was driving a black truck. He had also been driving the truck earlier in the afternoon on the 28th. Another witness testified that, on February 27, he observed defendant receive the keys to a black truck from a man and a woman in exchange for a bag of marijuana. The man and woman then departed in a red Mustang. The witness got a ride from defendant, driving the black truck. Mr. Satchell's mother owned a red Mustang. On cross-examination, Mr. Satchell denied he had ever sold marijuana or allowed defendant to use his truck in exchange for marijuana.

3. Aggravated Kidnapping

The prosecutor argued that an aggravated kidnapping occurred when defendant drove Mr. Satchell to and from his mother's house. Defendant argues there is not substantial evidence to support his conviction because, as stated in his opening brief, "the movement of [Mr. Satchell] to his mother's house was an integral and essential part of the robbery. . . . The asportation was incidental to the taking because the movement was necessary to accomplish the robbery."[3] The distance between the apartment and the house was apparently 3.8 miles.[4]

Resolving this issue requires the application of the California Supreme Court's holding in *People v. Rayford*,[5] in which the court said:

"Kidnapping for robbery, or aggravated kidnapping, requires movement of the victim that is not merely incidental to the commission of the robbery, and which substantially increases the risk of harm over and above that necessarily present in the crime of robbery itself. [Citations.] These two aspects are not mutually exclusive, but interrelated.

"As for the first prong, or whether the movement is merely incidental to the crime of robbery, the jury considers the 'scope and nature' of the movement. [Citation.] This

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[3] *People v. Green* (1980) 27 Cal.3d 1, 66-67; *People v. Guiton* (1993) 4 Cal.4th 1116, 1126, 1128.

[4] Evidence Code section 452, subdivisions (g) and (h). We grant appellant's motion for judicial notice, filed May 18, 2000.

[5] *People v. Rayford* (1994) 9 Cal.4th 1.

includes the actual distance a victim is moved. However, we have observed that there is no minimum number of feet a defendant must move a victim in order to satisfy the first prong. [Citation.]

"In addition, we have . . . analyzed the question of whether the movement was incidental to the commission of the underlying crime by considering the context of the environment in which the movement occurred. [Citation.]"[6]

Citing to *People v. Daniels*,[7] the *Rayford* court continued: "Thus, in *Daniels*, the defendants, 'in the course of robbing and raping three women in their own homes, forced them to move about their rooms for distances of 18 feet, 5 or 6 feet, and 30 feet respectively.' [Citation.] We held that these brief movements were merely incidental to the commission of robbery. [Citation.] We observed, 'Indeed, when in the course of a robbery a defendant does no more than move his victim around inside the premises in which he finds him—whether it be a residence, as here, or a place of business or other enclosure—his conduct generally will not be deemed to constitute the offense proscribed by section 209. Movement across a room or from one room to another, in short, cannot reasonably be found to be asportation "into another part of the same county"'" as required by section 207.[8]

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[6] *People v. Rayford*, *supra*, 9 Cal.4th at page 12.

[7] *People v. Daniels* (1969) 71 Cal.2d 1119, 1126, 1140.

[8] *People v. Rayford*, *supra*, 9 Cal.4th at pages 12-13.

The *Rayford* court elaborated further:

"The second prong of the *Daniels* test refers to whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that inherent in robbery. [Citations.] This includes consideration of such factors as the decreased likelihood of detection, the danger inherent in a victim's foreseeable attempts to escape, and the attacker's enhanced opportunity to commit additional crimes. [Citations.] The fact that these dangers do not in fact materialize does not, of course, mean that the risk of harm was not increased. [Citations.]"[9]

In this instance, the scope and nature of defendant's movement of the victim, being several miles, was significant and not incidental. Additionally, the context of the environment in which the movement occurred, from one residence to another, rather than occurring within a residence, a place of business, or some other enclosure, also indicated the movement was not incidental. Finally, some of the potential dangers from the movement of the victim, as identified in *Rayford* and *Daniels*, were present here. By forcing the victim to leave his home in the middle of the night, defendant rendered the victim more vulnerable because he was isolated and separated from his wife, a potential witness. Had Mr. Satchell tried to escape or tried to signal to the police they passed in their journey, the outcome could have proved dangerous, possibly fatal, since defendant had threatened to kill him and also threatened his wife.

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[9] *People v. Rayford*, *supra*, 9 Cal.4th at pages 13-14.

In *Rayford*, the court held there was substantial evidence of aggravated kidnapping when the defendant forced a woman to move 105 feet in a parking lot and attempted to rape her. Here too the evidence of aggravated kidnapping was substantial because defendant forcibly moved the victim several miles and exposed him to a substantial increase in the risk of harm beyond that inherent in robbery. Therefore, we decline defendant's invitation to reverse his conviction for aggravated kidnapping.

4. Residential Robbery

In his second argument on appeal, defendant raises the issue of whether he could properly be convicted of having committed residential robbery against Mr. Satchell based on defendant forcing Mr. Satchell to obtain $40 from his mother at her home. The information alleged Mr. Satchell, not his mother, was the victim of the crime. Defendant argues the charge cannot be sustained because defendant never entered the mother's house but waited in the car while Mr. Satchell went in and got the money. The People argue that a residential robbery occurred because Mr. Satchell was acting under compulsion when he asked his mother for money while inside her house.

This issue appears to be of first impression. But, after our analysis of the two relevant statutes and related case law, we conclude that it would unduly enlarge the crime of residential robbery to find that it occurred under the factual circumstances of this case.

Penal Code section 211 defines robbery: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Penal Code section 212.5, subdivision (a), defines first degree residential robbery: ". . . [E]very robbery which is

perpetrated in an inhabited dwelling house . . . is robbery of the first degree." Thus, two aspects of the crime of residential robbery are 1) taking by means of force or fear 2) inside an inhabited dwelling place. A key element in this case is the taking occurred from the victim's person or immediate presence.

The California Supreme Court has recently reiterated: "We consistently have held that, in order to constitute robbery, property must be taken from the possession of the victim by means of force or fear. 'To constitute robbery the property must be removed from the possession and immediate presence of the victim against his will, and such removal must be by force or fear.'"[10]

Defendant did not rob Mr. Satchell's mother. Neither defendant nor Mr. Satchell, acting under compulsion from defendant, took money from the mother against her will by means of force or fear. According to Mr. Satchell's testimony, he woke up his mother and told her he urgently needed money and she gave it to him. But he did not explain that he was acting under duress. His mother testified that he seemed upset but she did not testify that she acted against her will or under force or fear. The mother was not robbed.

On the other hand, defendant effectively concedes in his opening appellate brief that defendant robbed Mr. Satchell of the $40 he got from his mother. But defendant maintains that, because he took the money from Mr. Satchell while they sat in the truck parked outside

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[10] *People v. Nguyen* (2000) 24 Cal.4th 756, 761, citing *People v. Ramos* (1982) 30 Cal.3d 553, 589.

the mother's house, the robbery was not "perpetrated in an inhabited dwelling house" and therefore did not qualify as a residential robbery.[11]

According to the People, a robbery occurred, in which Mr. Satchell was the victim, when he received the $40 from his mother inside her house. We note there is a line of cases holding that a defendant can rob a person in the robber's own home.[12] Those cases reason, in a way not appropriate here, that a victim may be even more vulnerable when lured into the "lion's den" of the defendant's dwelling place.[13] But no cases say a person may be robbed in a home occupied by a third person and not occupied by the perpetrator or the victim, although one of the latter cases does pose that scenario as a possibility.[14]

Assuming, however, that a victim's mother's house is an inhabited dwelling place for the purposes of applying Penal Code section 212.5, subdivision (a), the evidence still does not establish that defendant constructively robbed Mr. Satchell in his mother's residence when Mr. Satchell took constructive possession of the $40. None of the cases cited by the People support their assertion that a robbery can occur when the robber is at a remove from the victim.

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[11] Penal Code section 212.5, subdivision (a).

[12] *People v. Alvarado* (1990) 224 Cal.App.3d 1165, 1170; *People v. Jackson* (1992) 6 Cal.App.4th 1185, 1191; *People v. McCullough* (1992) 9 Cal.App.4th 1298, 1300-1301.

[13] *People v. McCullough, supra,* 9 Cal.App.4th at page 1301; *People v. Jackson, supra,* 6 Cal.App.4th at page 1191.

[14] *People v. Jackson, supra,* 6 Cal.App.4th at page 1191.

[footnote continued on next page]

In *People v. Quinn*,[15] the court affirmed the principle that there must be "a taking of possession away from the victim and into the control of the taker . . . ."[16] In that case, the robbers ordered the victim at gunpoint to throw his wallet on the ground. At their request, he picked it up and showed them it contained no money. Although the defendants never touched the wallet, the court deemed a robbery had occurred. The immediate presence of the victim to the robbers, however, distinguishes that case from the present one where defendant did not take the money until Mr. Satchell returned to the truck. That is when the robbery occurred, not inside the mother's house.

In another case, the court held that a completed robbery occurred where defendants ordered a gas station attendant to put money in a paper bag but, after shooting the attendant, the defendants fled without taking the money. The court reasoned: "Robbery does not necessarily entail the robber's manual possession of the loot. It is sufficient if he acquired dominion over it, though the distance of movement is very small and the property is moved by a person acting under the robber's control, including the victim. [Citations.] In this case the robbers' dominion was short-lived but actual. The evidence supports the finding of a completed robbery."[17] Again, one distinction between this case and the present one is that

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[15] *People v. Quinn* (1947) 77 Cal.App.2d 734.

[16] *People v. Quinn*, *supra*, 77 Cal.App.2d at page 737.

[17] *People v. Martinez* (1969) 274 Cal.App.2d 170, 174.

the robbery took place within the immediate presence of the victim, not with victim and the robbers in separate locations.

In other cases cited by the People, the same distinction exists: the robberies occurred when the robbers were in the immediate presence of the victim.[18] Here the robbery occurred when Mr. Satchell returned to the truck and handed over the money to defendant: "The act of 'taking' begins when the separation of the victim from his or her property occurs . . . ."[19] Defendant may have committed robbery but not first degree robbery. Therefore, we reverse his conviction on count 5.

5. Carjacking

The principal offense in this case was count 9 for carjacking.[20] Defendant argues the evidence did not prove defendant forcibly took the car from Mr. Satchell in his immediate presence. Defendant interprets the crime of carjacking to involve dispossessing a victim of his vehicle and leaving him standing on the street. He reasons that, because the Satchells were in their apartment when he drove away in their truck, he was guilty of vehicle theft but not carjacking.

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[18] *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1460, disapproved on another ground in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13-14; *People v. Wright* (1996) 52 Cal.App.4th 203, 207.

[19] *People v. Webster* (1991) 54 Cal.3d 411, 442.

[20] Penal Code section 215.

Defendant, however, focuses inappropriately on the conclusion of defendant's crime spree, when he departed the apartment and left in the Satchells' truck. As the prosecutor argued in his closing statement, the carjacking began when Mr. Satchell first returned to his apartment and defendant took possession of the keys to the truck from Mr. Satchell. The carjacking continued as they drove to the mother's house, back to the Satchells' apartment, to an ATM machine, and finally returned again to the apartment.

The cases cited by defendant confirm his culpability for carjacking. Throughout his ordeal, Mr. Satchell was subjected to a "risk of harm greater than that involved in an ordinary theft from an unconscious individual."[21] This was not a case where defendant took Mr. Satchell's truck from the apartment parking lot as he slept upstairs. Instead, Mr. Satchell was made afraid, subjected to threats of violence, exposed to a high level of risk, compelled to surrender the vehicle to defendant, and suffered a loss of transportation. This constituted a carjacking, not vehicle theft.[22]

6. Resentencing

The People argue the case must be remanded for resentencing on count 1 for aggravated kidnapping because the trial court improperly imposed a reduced armed use enhancement when it should have imposed a full term.[23] Defendant offers no contrary

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[21] *People v. Hill* (2000) 23 Cal.4th 853, 860-861.

[22] *People v. Hill, supra,* 23 Cal.4th at page 859; *People v. Gray* (1998) 66 Cal.App.4th 973, 985; *People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1132.

[23] Penal Code sections 12022.5 and 12022.53.

[footnote continued on next page]

argument and we agree with the People. Instead of imposing three years, four months, the court should have imposed a full 10-year sentence for the gun enhancement.[24]

7. Disposition

We reverse defendant's conviction on count 5 for first degree robbery. We also remand for resentencing on count 9. Otherwise, the judgment is affirmed.

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s/Gaut
J.

We concur:

s/Richli
Acting P. J.

s/Ward
J.

[footnote continued from previous page]

[24] Penal Code section 12022.53, subdivision (b); *People v. Felix* (2000) 22 Cal.4th 651, 654-657.